DISTRIBUTED
MAR 4 1998

MAR 20 PAGE 13

ORIGINAL

Supreme Court, U.S.
FILED
FEB 18 1998
CLERK

No. 97-1202

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF FLORIDA,

PETITIONER

v.

LEONARDO FRANQUI,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

ERIC M. COHEN, ESQ.
Attorney for Respondent Leonardo Franqui
Two Datran Center, Suite 1504
9130 South Dadeland Blvd.
Miami, FL 33156
Tel. (305) 670-0230
Fax (305) 670-7003
Fla. Bar No.: 328-065

19 pp

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Leonardo Franqui, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: 1-28, 1998

(Signature)

Sworn and Subscribed before me this 28 of Jan-1998

Notary

Richard U. Tucker, Sr.
NY COMMISSION # C0603761 EXPIRES
February 9, 2001
BONDED THRU TROY FAIR INSURANCE, INC.

QUESTION PRESENTED

Whether the Supreme Court of Florida correctly held that a codefendant's confession implicating the Respondent lacked sufficient indicia of reliability to justify its admission as direct evidence against the Respondent.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
TABLE OF CONTENTS	2
TABLE OF CITATIONS	3
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	10
CONCLUSION	17

TABLE OF CITATIONS

Franqui v. State

699 So.2d 1332 (Fla. 1997) 9,13

Idaho v. Wright

497 U.S. 805 (1990) 10,12,15

Latine v. Mann

25 F.3d 1162 (2nd Cir. 1994) 11

Lee v. Illinois

476 U.S. 530 (1986) 11,14,15

Neumann v. Rivers

125 F.3d 315 (6th Cir. 1997) 12

United States v. Beydler

120 F.3d 985 (9th Cir. 1997) 12,14

United States v. Costa

31 F.3d 1073 (11th Cir. 1994) 12

United States v. Flores

985 F.2d 770 (5th Cir. 1993) 11

United States v. Hazelett

32 F.3d 1313 (8th Cir. 1994) 12

United States v. Trenkler

61 F.3d 45 (1st Cir. 1995) 12

Williamson v. United States

512 U.S. 594 (1994) 11

STATEMENT OF THE CASE

On January 3, 1992, Steven Bauer, an off-duty police officer, was fatally shot during a robbery at the Kislak National Bank in North Miami, Florida. The shooting occurred while Bauer was escorting two tellers to the drive-through windows at the bank. A cash box was taken from one of the tellers during the incident. The assailants used two stolen Chevrolet Caprices to leave the bank.

On January 18, 1992, the police questioned Respondent Leonardo Franqui about this incident. Initially, Franqui denied having participated in the robbery. Instead, he claimed that he was at home with his wife at the time in question. Later, after being told that he had been implicated by other individuals in police custody, the Respondent conceded that he was involved in the robbery.

Specifically, Franqui claimed that codefendant Fernando Fernandez had suggested robbing the bank several weeks before. Fernandez had been told about the tellers' activities there by a black male acquaintance of his. The Respondent further explained that the Caprices were stolen by his codefendants, that he, his codefendants (except Fernandez) and the black male had gone to the bank on the day before the incident to commit the robbery but that that plan was aborted as too many cars were present and that the participants congregated at codefendant Pablo San Martin's house on the morning of January 3rd. The defendants then drove to another location where

codefendant Pablo Abreu remained with a Buick Regal. The others proceeded to the bank. Franqui claimed that he had a .9 mm handgun and that codefendant Ricardo Gonzalez carried a .357 revolver.

At the bank, the four defendants -Franqui, Gonzalez, San Martin, and Fernandez -exited the Caprices after seeing that the tellers and an armed escort had left the main bank building. Gonzalez then yelled "freeze." The Respondent also heard a shot although he could not determine who had fired it. In response, Franqui fired once and returned to the Caprice in which he had arrived. He later received $2,400 of the money taken from the bank. The Caprices were left at the location where Abreu had waited in the Regal.

Gonzalez and San Martin also spoke to the police on January 18th. Prior to being questioned, Gonzalez was told by the interrogating detective that the detective had received information about the charged offenses from a "codefendant." Gonzalez then stated that the Respondent had asked him to participate in the robbery. On the day of the incident, Franqui picked up first Gonzalez and then San Martin. They later met Abreu and Fernandez by the stolen cars. Gonzalez portrayed Franqui as the individual who instructed the others about what was to occur at the bank and as the source of the .38 caliber firearm that he used during the incident. Gonzalez could not say what type of gun Franqui purportedly carried.

At the bank, the Respondent yelled "don't move" in Spanish after he and Gonzalez exited the vehicle in which they had driven. When Bauer reached for his gun, Franqui shot him three or four times. Gonzalez fired once. He believed that his bullet ricocheted and hit the officer in the leg. San Martin then took one of the cash boxes.

San Martin, like Franqui, claimed that the plan to rob the bank originated with Fernandez' black male acquaintance. He, like Franqui, admitted that the defendants went to the bank prior to January 3rd, that they met at his house on the morning of the incident and that Abreu stayed by the Regal while the others went to the bank. When the tellers and their escort left the bank, San Martin heard approximately three shots. He did not know, however, which -if any- of his codefendants was armed. After the shooting stopped, he took a cash box.

On February 4, 1992, an Indictment was returned in the Circuit Court for Dade County, Florida charging Franqui, Fernandez, Gonzalez, Abreu and San Martin with first degree murder of a law enforcement officer, armed robbery with a firearm, two counts of aggravated assault, unlawful possession of a firearm during a criminal offense, two counts of grand theft and two counts of burglary.

Prior to trial, the Respondent sought a severance of his trial from that of his codefendants, claiming that the admission of his codefendants' post-arrest statements at a joint trial would violate his Sixth Amendment right of confrontation. In partially

denying that request,[1] the trial court found that due to their "interlocking" nature, each of the post-arrest statements was admissible against the other defendants.

A jury trial began on May 23, 1994. During trial, the Respondent repeatedly renewed his objection to the introduction of Gonzalez and San Martin's statements. Those objections were overruled.

In addition to the defendants' statements, the prosecution offered evidence that Franqui's fingerprint was lifted from the outside of one of the Caprices. A bystander also identified Franqui as the driver of one of the Caprices although that witness had been unable to do so prior to trial and during his initial trial testimony. Finally, ballistics evidence indicated that the fatal bullet was fired from the gun that Gonzalez had admitted possessing.

Franqui was ultimately convicted of each of the offenses with which he was charged.[2] He was later sentenced to death for the first degree murder offense.

On July 3, 1997, the Florida Supreme Court issued an opinion affirming

---

[1]. The court severed Fernandez' trial from that of the remaining defendants. Abreu had previously pleaded guilty.

[2]. The State had earlier nolle prosqued one of the aggravated assault charges and the unlawful possession of a firearm charge.

Franqui's convictions but reversing his death sentence.[3] Specifically, that court held that although Gonzalez' statement was improperly admitted as evidence against the Respondent, that error was harmless with respect to the issue of guilt or innocence. However, the court found that that error necessitated a new penalty proceeding. A request for rehearing was later denied.

---

[3]. Franqui v. State, 699 So. 2d 1332 (Fla. 1997).

THE SUPREME COURT OF FLORIDA CORRECTLY FOUND THAT A CODEFENDANT'S CONFESSION IMPLICATING THE RESPONDENT WAS IMPROPERLY ADMITTED AGAINST THE RESPONDENT AT TRIAL AS THAT CONFESSION LACKED SUFFICIENT INDICIA OF TRUSTWORTHINESS TO OVERCOME THE PRESUMPTIVE UNRELIABILITY OF SUCH STATEMENTS

A) Those portions of the codefendant's statement that inculpated the Respondent were not genuinely statements against penal interest.

The State of Florida ("State") has argued that statements against penal interest comprise a "firmly rooted" hearsay exception and that codefendant Ricardo Gonzalez' post-arrest statement inculpating both himself and Respondent Leonardo Franqui was thus admissible against Franqui. The Court need not address that issue, however, as Gonzalez' confession was not truly a statement against penal interest.

Statements admitted pursuant to a "firmly rooted" hearsay exception do not violate the Confrontation Clause of the Sixth Amendment because they "are so trustworthy that adversarial testing would add little to their reliability." Idaho v. Wright, 497 U.S. 805, 821 (1990). However, this Court has recognized that "a

codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." Lee v. Illinois, 476 U.S. 530,545 (1986). Due to this inherent unreliability, the Court has further found that the Federal Rules of Evidence do "not allow admission of non-self- inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." Williamson v. United States, 512 U.S. 594, 600-1 (1994). Instead, a codefendant's confession is admissible against an accused only if it is "truly self-inculpatory." Id. at 603.

The federal courts of appeals that have construed Lee and Williamson have uniformly viewed codefendants' confessions with heightened scrutiny. For example, the Second Circuit has found that a codefendant's statement "result[ing] from a formal police interrogation" is inadmissible unless the defendant adopts or authorizes the statement. Latine v. Mann, 25 F.3d 1162, 1166-7 (2nd Cir. 1994). Similarly, the Fifth Circuit has "categorical[ly]" rejected the admission of "third party accusations made in ex parte confessions to law enforcement or prosecutorial authorities [.]" United States v. Flores, 985 F.2d 770,783 (5th Cir. 1993). Other courts, while not applying a per se rule, have reversed convictions because a codefendant's post-arrest statement

to law enforcement officials was not "genuinely" against the declarant's penal interest.[4] Even those circuits holding that statements against interest fall within a "firmly rooted" hearsay exception have apparently limited that finding to situations in which the declarant did not directly inculpate the accused.[5] Accordingly, the State, as proponent of the challenged testimony, must overcome a substantial burden to justify the admissibility of Gonzalez' statement against Franqui.

The State claims that Gonzalez' statement was truly inculpatory simply because he did not attempt to minimize his own guilt. This argument, however, mischaracterizes the evidence. More importantly, it ignores the circumstances in which the statement was made. See Wright, supra at 819. Those circumstances clearly establish the inherent unreliability of Gonzalez' confession.

Gonzalez was arrested on January 18, 1992. Prior to questioning him about the

---

4. See United States v. Hazelett, 32 F.3d 1313 (8th Cir. 1994) (after being arrested in possession of cocaine, declarant had "nothing to lose by implicating" the defendant. Id. at 1318.); United States v. Beydler, 120 F.3d 985 (9th Cir. 1997) (declarant was confronted by police about seriousness of offense); United States v. Costa, 31 F.3d 1073 (11th Cir. 1994) (same).

5. See United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995); Neumann v. Rivers, 125 F.3d 315 (6th Cir. 1997).

charged offenses, the detectives apprised him of the information they "had received from the codefendant."[6] (TR:189-90,1398) Gonzalez then gave a statement in which "he went into great detail in characterizing Franqui as the leader of the robbery plan." Franqui v. State, 699 So.2d 1332,1336 (Fla. 1997).[7] Gonzalez also alleged that Franqui supplied him with a gun, (TR:1440), initially yelled towards the tellers and their escort, (TR:1443), and shot first at the officer. (TR:1444) Gonzalez admitted firing a single shot which struck the officer in the leg only after it ricocheted off a post. (TR:1461) Significantly, the ballistics evidence refuted this latter claim and suggested that Gonzalez had in fact fired the fatal shot. Accordingly, Gonzalez' statement was

---

[6]. The record reflects that Fernando Fernandez was the codefendant who had supplied this information. However, the record does not suggest that Gonzalez knew this. Instead, as Franqui and codefendant Pablo San Martin had been arrested four days earlier on unrelated charges, Gonzalez could have logically assumed that one or both of them had implicated him.

[7]. Specifically, Gonzalez claimed that the Respondent: 1) asked if he wanted to participate in "something [he had] going down," (TR:1427); 2) advised him about the drive-through tellers at the bank and the cash drawers that they carried, (TR:1429); 3) intended to steal two cars to be used in the robbery, (TR:1434); and 4) instructed the others of what to do during the incident. (TR:1438)

a blatant attempt to minimize his own conduct.

Even if Gonzalez did not minimize his own involvement, however, his statements concerning the Respondent must still be viewed with skepticism. Knowing the seriousness of the charged offenses, Gonzalez may have wanted to "curry favor" with his interrogators. Knowing that he had been implicated by one of his codefendants, he may have sought to "avenge himself" by implicating others. Knowing the potential consequences of his actions, he may have wished to "divert attention to another." According, the factors recognized by the Court in Lee may have all contributed to a statement which must be presumed to be unreliable.[8]

Significantly, in Lee, the Court declined to classify Thomas' confession as a "simple 'declaration against penal interest.'" Id. at 544 (ftnt.5). Instead, it viewed that statement as "a confession by an accomplice which incriminates a criminal defendant." Id. Other courts have used the same approach when considering a codefendant's statement that implicates the accused. See e.g., Flores, supra. Clearly, nothing about Gonzalez'confession suggests that a different analysis is appropriate here. Accordingly, the State has failed to satisfy its threshold burden of showing that that confession qualified as a statement against penal interest. As, in this respect, the instant case is essentially identical to Lee, review here should be denied.

---

[8]. See Beydler, supra (although the declarant did not "trivialize his role or try to shift blame," an incentive to "curry favor" with the police remained. Id. at 988.).

B) **The circumstances in which the codefendant's confession was given do not suggest that that confession was reliable as the codefendant clearly attempted to minimize his involvement in the charged offenses.**

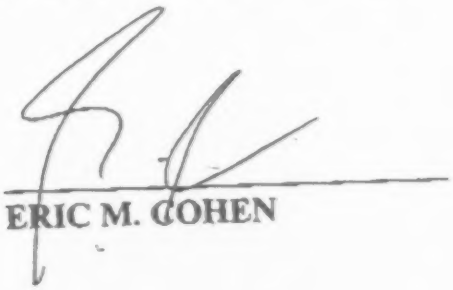
Alternatively, the State argues that Gonzalez' confession was admissible against Franqui because it exhibited "particularized guarantees of trustworthiness." Its argument, however, misapprehends the issue. The question is not, as the State suggests, whether the declarant "fully inculpates himself," Petition at p.18, but whether those portions of the declarant's statement that inculpate the accused are sufficiently reliable. As discussed above, Gonzalez' motives for revenge and to curry favor render his statements incriminating the Respondent unreliable, and thus inadmissible.

The State's argument relies almost exclusively on Gonzalez' failure to minimize his own involvement in the charged offenses. But, again, that claim is belied by the record below. Additionally, even a complete admission of his own culpability does not negate his incentive to falsely implicate Franqui as revenge or as a ploy to better his own bargaining position with law enforcement. Also, the State's argument that the declarant's confession was voluntary was given little weight in Lee. Id. at 544. It merits no more attention here. Finally, consideration of the "interlocking" nature of the defendants' confessions would clearly run afoul of this Court's decision in Wright, supra. Accordingly, Gonzalez' statement lacked sufficient "particularized guarantees

of trustworthiness" to justify admission. As the inquiry into the reliability of that statement is fact-specific, it is not an issue that warrants review by this Court.

CONCLUSION

For the reasons argued above, the State's petition for a writ of certiorari should be denied.



ERIC M. COHEN